IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 20, 2006

STATE OF TENNESSEE v. TAMMY RUMBAUGH

Direct Appeal from the Circuit Court for Wayne County
No. 13249 Jim T. Hamilton, Judge

No. M2004-02176-CCA-R3-CD - Filed December 13, 2006

Following a jury trial, Defendant, Tammy Rumbaugh, was found guilty of reckless aggravated assault, a Class D felony, and vandalism of property valued at between $1,000 and $10,000, a Class D felony. The trial court sentenced Defendant to concurrent sentences of four years for each conviction, six months of which was to be served in the county jail, and the remainder suspended and Defendant placed on probation. In her appeal, Defendant challenges the sufficiency of the convicting evidence, the length of her sentence, and the trial court's failure to grant her full probation. After review, the judgments of the trial court are reversed in part and remanded in part.

Tenn. R. App. P. 3, Appeal as of Right;
Judgments of the Circuit Court Reversed in Part and Remanded in Part

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID G. HAYES and NORMA MCGEE OGLE, JJ., joined.

Claudia S. Jack, District Public Defender; and R.H. Stovall, Jr., Assistant Public Defender, Pulaski, Tennessee, for the appellant, Tammy Rumbaugh.

Paul G. Summers, Attorney General and Reporter; David H. Findley, Assistant Attorney General, T. Michel Bottoms, District Attorney General; and Douglas A. Dicus, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

Dwayne Daniel Thompson testified that he had known Defendant for approximately fifteen years. Defendant called Mr. Thompson around 6:00 p.m. on July 5, 2003. Mr. Thompson did not want to speak to Defendant, so his friend, Cynthia Heard, who was visiting that night, answered the telephone. Eventually, Mr. Thompson talked with Defendant who said she wanted to come over and pick up some personal items and her medicine which she had previously left at Mr. Thompson's

house. Mr. Thompson told Defendant not to come because Ms. Heard was there and told Defendant his front gate was locked. Mr. Thompson said his property was fenced, and Defendant did not have a key to the gate.

Some time later, Mr. Thompson and Ms. Heard were sitting in front of Mr. Thompson's personal computer when they looked up and saw Defendant in the back yard slashing the tires of Ms. Heard's car. Mr. Thompson told Ms. Heard to stay inside and lock the door while he went outside to try to calm Defendant. When he reached the back yard, Mr. Thompson said that Defendant came towards him waving a knife. Mr. Thompson caught Defendant's wrist and disarmed her. Mr. Thompson told Defendant to leave and gave her back her knife. Mr. Thompson went inside his home, gathered up Defendant's personal items, and took them to the front gate. When he returned to the back yard, Defendant had disassembled a trampoline and was using one of the steel legs to smash the windows out of Ms. Heard's car. Mr. Thompson tried to restrain Defendant, but Defendant ran to Mr. Thompson's back door and broke out the glass in a side window with the trampoline leg. Defendant reached inside the window, severely cutting her arm on the broken glass. Mr. Thompson said that Defendant sat down and waited until the police officers arrived.

On cross-examination, Mr. Thompson acknowledged that Defendant had taken out a warrant for his arrest for assault prior to the incident. He also acknowledged that Defendant and Ms. Heard had previously taken out warrants against each other. Mr. Thompson said that there had been animosity between Defendant and Ms. Heard for a number of years.

Ms. Heard testified that she had known Defendant about eight years. Ms. Heard said that she saw Defendant slit all four of her car tires and break out each car window with one of the legs from the trampoline in Mr. Thompson's backyard. Ms. Heard said that Defendant broke out the glass in the window next to Mr. Thompson's back door and reached in to unlock the dead bolt. Ms. Heard grabbed Defendant's hand to prevent her from unlocking the door, and Defendant attempted to poke her in the face with the trampoline pole. When Defendant jerked her hand back from Ms. Heard's grasp, she cut her arm on the broken glass from the window. Ms. Heard said she felt threatened by Defendant's conduct.

Ms. Heard said she purchased her car a few months before the incident for approximately $1,900. Ms. Heard said that the estimated cost for repairing the damage to her car was more than its fair market value.

Deputy Ronnie Michael Harville was employed by the Wayne County Sheriff's Department at the time of the incident and responded to the 9-1-1 call originating from Mr. Thompson's home. Deputy Harville said that Mr. Thompson unlocked the front gate to let him on the property. Defendant was slumped on the ground when Officer Harville arrived, and he called for an ambulance. Deputy Harville said that he found one trampoline leg on the back porch of Mr. Thompson's trailer, and another trampoline leg beside Ms. Heard's car. A substance resembling blood was found on both poles. Deputy Harville said that the interior of the trailer was littered with glass from the broken back window.

The State rested its case-in-chief. Defendant testified on her own behalf. According to her testimony, Defendant spent the night of July 4, 2003, with Mr. Thompson and left the next morning around 8:30 a.m. After she arrived home, she realized that she had left her antibiotics for a sinus infection at Mr. Thompson's trailer. In the early evening of July 5, 2003, Defendant noticed that Mr. Thompson had attempted to call her during the day, and she returned his call around 9:00 p.m. Ms. Heard answered the telephone, however, and would not let her speak to Mr. Thompson. Defendant said that she needed her medicine, so she drove to Mr. Thompson's trailer around 9:30 p.m. Defendant parked outside Mr. Thompson's fence and climbed over the gate. Defendant said it was dark and she did not notice Ms. Heard's car. Mr. Thompson met Defendant at the back door and handed the medicine to her. Defendant told him that she also wanted certain personal items and waited on the back porch while Mr. Thompson went to gather up her things. Defendant said that she thought Mr. Thompson was throwing her things out the front door and called out his name. Defendant said the glass was broken out of the back window, and Ms. Heard pointed a shotgun at her through the window. Defendant reached for the gun's barrel to push it out of the way. Ms. Heard grabbed Defendant's arm and "see sawed it through the glass." Defendant said that the gash required sixty stitches. Defendant denied damaging Ms. Heard's car, and she said that she only had a pocket knife with her on the night of the incident.

Deputy Harville was recalled as a witness and testified that he noticed some personal items by Mr. Thompson's front gate, but he did not see any items near the trailer's front door. Deputy Harville said that the items appeared to have been tossed over the gate.

II. Sufficiency of the Evidence

A. Reckless Aggravated Assault

Relying on *State v. Goodwin*, 143 S.W.3d 771 (Tenn. 2004), Defendant argues that she was convicted of an offense, reckless aggravated assault, which is not a lesser included offense of the charged offense of aggravated assault based on knowingly or recklessly causing another to reasonably fear imminent bodily injury. Alternatively, Defendant argues that the evidence is insufficient to support her conviction of reckless aggravated assault because there was no proof that Ms. Heard suffered any bodily injury.

When a defendant challenges the sufficiency of the convicting evidence, we must review the evidence in a light most favorable to the prosecution in determining whether a rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979). Once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Black*, 815 S.W.2d 166, 175 (Tenn. 1991). The defendant has the burden of overcoming this presumption, and the State is entitled to the strongest legitimate view of the evidence along with all reasonable inferences which may be drawn from that evidence. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). The jury is presumed to have resolved all conflicts and drawn any reasonable inferences in favor of the State. *State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn.

1984). Questions concerning the credibility of witnesses, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

In the indictment, Defendant was charged with "unlawfully, intentionally, knowingly or recklessly by display of a deadly weapon caus[ing] Cynthia Heard to reasonably fear imminent bodily injury by threatening to hit her with a metal pipe . . . ." *See* T.C.A. § 39-13-102(a)(1)(B). The trial court instructed the jury on reckless aggravated assault, assault, and misdemeanor assault as lesser included offenses of the charged offense. The jury chose to convict Defendant of the offense of reckless aggravated assault.

As provided by statute, a person commits reckless aggravated assault when he or she "recklessly commits an assault as defined in § 39-13-101(a)(1), and: (A) causes serious bodily injury; or (B) uses or displays a deadly weapon." T.C.A. § 39-13-102(a)(2)(A), (B). The offense of assault as defined in Tennessee Code Annotated section 39-13-101(a)(1) requires proof that the person committing the offense "intentionally, knowingly, or recklessly cause[d] bodily injury to another." Because the offense of reckless aggravated assault requires proof of bodily injury, our supreme court has concluded that the offense of reckless aggravated assault is not a lesser included offense of aggravated assault committed by causing another to reasonably fear imminent bodily injury by the use or display of a deadly weapon. *Goodwin*, 143 S.W.3d at 776; *See* T.C.A. § 39-13-101(a)(2). However, "[r]eckless aggravated assault is a lesser included offense of aggravated assault if the aggravated assault was charged under Tennessee Code Annotated Section 39-13-101(a)(1), intentionally or knowingly causing bodily injury to another." *Goodwin*, 143 S.W.3d at 777 n.4.

In the case *sub judice*, Defendant was charged with aggravated assault under Tennessee Code Annotated section 39-13-101(a)(2). Applying the above principles, we conclude that Defendant was improperly convicted of reckless aggravated assault because it is not a lesser included offense of the charged offense. Accordingly, we remand the case for a new trial on charges of assault as a lesser-included offense of aggravated assault. As the supreme court explained in *State v. Goodwin*, "[b]y finding the defendant guilty of reckless aggravated assault, the jury never reached the issue of whether the defendant was guilty of assault. Thus, because [s]he was never acquitted on the charges of assault, as [s]he had been on the charges of aggravated assault, [s]he may be retried on that lesser charge." *Goodwin*, 143 S.W.3d at 777 (citing *State v. Rush*, 50 S.W.3d 424, 432 (Tenn. 2001); *State v. Maupin*, 859 S.W.2d 313, 317 (Tenn. 1993)).

B. Vandalism

As relevant here, a person commits vandalism when he or she knowingly causes damage to the personal property of another. T.C.A. § 39-14-408(a). "Damage" includes tampering with property and causing pecuniary loss or substantial inconvenience to the owner of the property. *Id.* § 39-14-408(b)(1)(B). Ms. Heard and Mr. Thompson testified that they witnessed Defendant slash

all four of the tires on the car belonging to Ms. Heard and break out all of the car's windows with a steel pipe. Ms. Heard said that she had purchased the vehicle a few months before the incident for approximately $1,900. Ms. Heard said that she secured estimates for the cost to repair the vehicle, and these costs exceeded what she paid for the car.

Defendant's challenge to the sufficiency of the evidence essentially rests on the contention that the jury should have credited her testimony that she did not damage Ms. Heard's car over that of Mr. Thompson and Ms. Heard. The jury heard Defendant's testimony and the testimony of the State's witnesses concerning the incident, and, by its verdict, obviously resolved any conflicts in favor of the State's witnesses. *See State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973) ("A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.").

Based on our review, we conclude that a rational trier of fact could find Defendant guilty beyond a reasonable doubt of the offense of vandalism. Defendant is not entitled to relief on this issue.

III. Sentencing Issues

In her next issue, Defendant argues that the lengths of her sentences were excessive, and that the trial court erred in not granting her full probation. Although we are reversing and remanding this case on other grounds, we will address this issue as guidance for the trial court and in the event of further review.

When an accused challenges the length and manner of service of a sentence, it is the duty of this Court to conduct a *de novo* review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991).

In conducting a *de novo* review of a sentence, this court must consider (a) any evidence received at the trial and/or sentencing hearing, (b) the presentence report, (c) the principles of sentencing, (d) the arguments of counsel relative to sentencing alternatives, (e) the nature and characteristics of the offense, (f) any mitigating or enhancing factors, (g) any statements made by the accused in his own behalf, and (h) the accused's potential or lack of potential for rehabilitation or treatment. T.C.A. §§ 40-35-103, -210. The party challenging the sentences imposed by the trial court has the burden of establishing that the sentence is erroneous. T.C.A. § 40-35-401, Sentencing Commission Cmts.; *Ashby*, 823 S.W.2d at 169.

At the time of Defendant's trial, a defendant was eligible for probation when the sentence received by the defendant was eight years or less, subject to some statutory exclusions not applicable here. *See* T.C.A. § 40-35-303(a) (2003). As such, Defendant's sentence will be reviewed under

those guidelines. We note however that under the new sentencing guidelines as amended in 2005, a defendant is eligible for probation when the sentence received is ten years or less. *See* T.C.A. § 40-35-303(a) (Supp. 2005). Although full probation must be automatically considered by the trial court as a sentencing alternative whenever the defendant is eligible, "the defendant is not automatically entitled to probation as a matter of law." T.C.A. § 40-35-303(b), Sentencing Commission Cmts.; *State v. Hartley*, 818 S.W.2d 370, 373 (Tenn. Crim. App. 1991). On appeal, a defendant seeking full probation bears the burden of showing that the sentence imposed is improper and that probation will be in the best interest of the defendant and the public. *State v. Baker*, 966 S.W.2d 429, 434 (Tenn. Crim. App. 1997).

There is no bright line rule for determining when a defendant should be granted probation. *State v. Bingham*, 910 S.W.2d 448, 456 (Tenn. Crim. App. 1995). Every sentencing decision necessarily requires a case-by-case analysis. *Id*. Factors to be considered include the circumstances surrounding the offense, the defendant's criminal record, the defendant's social history and present condition, the need for deterrence, and the best interest of the defendant and the public. *State v. Goode*, 956 S.W.2d 521, 527 (Tenn. Crim. App. 1997). The trial court may also appropriately consider the defendant's candor and willingness to accept responsibility for his or her actions when considering whether probation should be granted, as these reflect upon the defendant's potential for rehabilitation. *See State v. Nunley*, 22 S.W.3d 282, 289 (Tenn. Crim. App. 1999); *State v. Zeolia*, 928 S.W.2d 457, 463 (Tenn. Crim. App. 1996); *State v. Dowdy*, 894 S.W.2d 301, 306 (Tenn. Crim. App. 1994).

At the conclusion of the sentencing hearing, the trial court determined that Defendant should be incarcerated for six months of her effective four-year sentence. The court first noted that domestic disputes such as the one in the case *sub judice* often end up with one of the parties to the altercation being found dead. The court then stated that "I think this case has got homicide written all over it." The court went on to say that there was no explanation for why individuals repeatedly return to dead-end relationships when they know "if they keep coming back they['re] going to eventually get into trouble." Finally, the court found as follows:

> [O]n April 28, 2004, [Defendant], in this case State of Tennessee versus Tammy Denise Rumbaugh a jury of your peers found you guilty in count one of this indictment number 13249 of reckless aggravated assault. It will therefore be the judgment of the Court that you be found guilty in accordance with that jury verdict of reckless aggravated assault. The punishment imposed should be a four year sentence with the Tennessee Department of Correction.
>
> The jury also found you guilty of count two of that indictment, which was vandalism in the amount of $2500.00 and it will therefore be the judgment of the Court that you be found guilty in accordance with that verdict of that offense. Punishment shall be a four year sentence with the Tennessee Department of Correction to be served concurrent with the count one of this indictment and I'm going to suspend forty-two months of that sentence after you serve six months in the Wayne County Jail . . . ."

As evident from the trial court's statements, the court found that Defendant did not meet her burden of showing her suitability for total probation. *Baker*, 966 S.W.2d at 434. However, the trial court made no specific findings of fact upon which to base our review. As previously stated, we cannot review the sentencing determinations of the trial court without an "affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *State v. Ashby*, 823 S.W.2d at 169. We have no choice but to remand this case to the trial court in order that the court may place its sentencing considerations and findings of fact upon the record. To do otherwise would, in essence, require this Court to impose Defendant's sentence for vandalism and that is not the province of this Court. We also note that in the event we had not reversed the Defendant's conviction for reckless aggravated assault, that sentence would likewise be remanded for further proceedings in accordance with this opinion.

CONCLUSION

For the foregoing reasons, the judgments of the trial court are reversed in part and remanded in part.

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THOMAS T. WOODALL, JUDGE